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IN THE

Supreme Court of the United States

VICTORIO J. MARTINEZ, OFIR MARTINEZ, JOSEPH S. GRIFFIN, COLLEEN GRIFFIN, VERNER R. GLENN, JANIE E. GLENN, JOHN S. WADE, JR., and IRIS RILEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States and Florida have destroyed 2.5 million healthy Florida citrus trees on the flawed theory that this is necessary to halt the spread of a "plant pest"—citrus canker, Asian strain. Each agency acts under its own statute, but in strict compliance with the federal Plant Protection Act and the explicit instructions of the Secretary of Agriculture, who jointly selects the trees to be destroyed, whereupon a contractor cuts them down.

Question: When the United States acting under federal law requires a state to join with it under state law to produce a result compelled by the federal law, and they jointly commit a taking, does the United States, the state, or both have liability for the outcome?

RULE 29.6 STATEMENT

The Petitioners are individuals.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Petition 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adikes v. S.H. Kress and Co., 398 U.S. 144 (1970) 11

Biderman v. Morton, 497 F.2d 1141 (2d Cir. 1974) 5

Bor-Sun Building Corporation v. Heller, 572 F.2d 174 (8th Cir. 1978) 5

Brown v. United States, 73 F.3d 1100 (Fed. Cir. 1996) 4, 6

Fund for Animals v. Lujan, 962 F.2d 1391 (9th Cir. 1992) 5

Haire v. The Florida Department of Agriculture and Consumer Services, __ So.2d __, 2004 Westlaw 252015 (Fla. February 12, 2004) 10

Hendler v. United States, 952 F.2d 1364 (1991) 4

Cited Authorities

Page

Hendler v. United States, 952 F.2d 1525 (Fed. Cir. 1996) 6, 11

Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1985) 6, 11, 12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 10

Pendleton v. United States, 47 Fed.Cl. 480 (2000) 12

Presault v. United States, 100 F.3d 1525 (Fed.Cir. 1996) 4, 6, 11, 12

United States v. Behety, 32 F.3d 503 (11th Cir. 1994) 5

United States Constitution:

Fifth Amendment 2

Cited Authorities

Page

STATUTES:

7 U.S.C. § 7701(9) 12, 13

7 U.S.C. § 7702(9) 14

7 U.S.C. § 7731(c) 13

7 U.S.C. § 7751(b)(1) 7, 13

7 U.S.C. § 7751(b)(2) 7, 13

7 U.S.C. § 7756(b)(1) 12, 14

7 U.S.C. § 7756(b)(2) 12, 14

28 U.S.C. § 1254(1) 1

Other Authority:

P. Beckmann, THE STORY OF PI 174 (1993) 11

TABLE OF APPENDICES

Page

Appendix A — Judgment Of The United States Court Of Appeals For The Federal Circuit Dated And Filed November 12, 2003 ..... 1a

Appendix B — Order On Defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment And Plaintiffs' Cross Motion For Summary Judgment Filed January 9, 2003 ..... 3a

Appendix C — Order Of The United States Court Of Appeals For The Federal Circuit Denying Petition For Rehearing Dated And Filed February 18, 2004 ... 26a

Appendix D — Relevant Statutes 28a

Victorio Martinez, Ofir Martinez, Joseph S. Griffin, Colleen Griffin, Verner R. Glenn, Janie Glenn, John Wade, Jr., and Iris Riley, for themselves and all others similarly situated, petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit.

Opinions Below

The district court's opinion granting summary judgment to the United States is unreported.[1] The per curiam opinion of the federal circuit is unreported.[2] The order denying a rehearing and hearing en banc in the federal circuit is unreported.

Statement of Jurisdiction

The order denying a rehearing and hearing en banc in the federal circuit was entered on February 18, 2004.[3] This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Appendix B.

[2] Appendix A.

[3] Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Plant Protection Act of 2000 is reproduced in appendix D.

STATEMENT OF THE CASE

The United States and Florida created a joint agency called the Citrus Canker Eradication Program (CCEP) and bound themselves to act jointly through the CCEP to destroy citrus trees in south Florida. They have thus far cut down more than 2.5 million trees. The district court granted summary judgment to the United States, and the federal circuit affirmed without opinion.

This is thus a case on the limits to the liability of the United States for joint acts with a state or local government that destroy private property. This issue falls mainly to the federal circuit, which has not developed internally consistent, reliable, and persuasive rules for decision that even it will observe.

Most of the law of inverse condemnation by the United States is well settled. The law widely exempts the United States from liability for a taking in most of its traditional ways of acting or failing to act.[4] The federal courts nonetheless have difficulty finding a consistent rule to apply

[4] District court opinion, appendix B, 13a-14a, reviewing cases.

where the United States does not act alone—where it does not limit itself to oversight or advice, but collaborates step-by-step with a state or local government in a taking.

Sometimes the courts apply the state law of agency to determine whether the United States has vicarious liability.[5] Others say—as the district court said here—that the law of agency is too intrusive, bold, or inhibiting of federal power, even if accurately applied.[6] This reticence leaves the United States in a position to impose on the state a duty to act that goes too far, but that saddles the state with sole liability for the result[7] and thereby encourages the United States to push too hard for a bad outcome.

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[5] *Presault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996)(en banc); *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996); *Hendler v. United States*, 952 F.2d 1364, 1378 (1991).

[6] District court opinion, appendix B, 25a ("unprecedented expansion of takings liability").

[7] The district court ruled that it would not reach the issue whether a taking had been done, because if it had, the sole liability for the taking was the state's. District court opinion, appendix B, 4a n. 1.

In some cases—again as here—each government regards their relationship as a genuine or de facto partnership or joint venture, but the court will not let them have it so.[8] The district court here mistakenly concluded that the United States cannot be liable in a joint venture, although that is what the governments describe.[9]

When the district court refused to apply the law of agency, it did not leave the parties at square one. It fashioned an odd nugget of federal common law that shrinks from the margins of

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[8] R Gaskalla, state co-director of CCEP, deposition, circuit record A806-07; R. Gaskalla affidavit, circuit record A1087-88; M. Hornyak, federal co-director of CCEP, deposition, circuit record A1051.

The district court characterized the CCEP directors' characterization as plaintiffs' "new theory." District court opinion, appendix B, 24a.

[9] *Bor-Sun Building Corporation v. Heller*, 572 F.2d 174, 178-181 (8th Cir. 1978) (secretary of HUD liable on joint venture theory); *United States v. Behety*, 32 F.3d 503, 510-11 (11th Cir. 1994) (search and seizure liability of United States and foreign government acting as joint venture); *Biderman v. Morton*, 497 F.2d 1141 (2d Cir. 1974) (same); *Fund for Animals v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992) (same).

agency where the parties did not, which finds no organizing theory once agency is rejected, and which picks among circuit decisions not with deference or by iteration, but at odds with them. In the face of this refusal to apply its authority, the federal circuit (Judges Rader, Linn, and Bryson) affirmed without opinion. The result is serendipity and random interaction, a silent rebuke to its own cases.[10]

This case illustrates the use of a fiction in joint action cases that the state acts alone or independently, that it acts under a state law, and that it does the last act in a taking.[11] The federal

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[10] *Presault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (en banc); *Hendler v. United States*, 952 F.2d 1525 (Fed. Cir. 1996) (common law agency a basis for decision); and *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985) (United States liable for invasion of private property even when Congress does not explicitly authorize taking), cannot be squared with the decision of the district court in this case, because under basic rules of agency they decline to establish liability solely against the last government to act. *See Brown v. United States,* 73 F.3d 1100 (Fed.Cir. 1996) (physical occupation or destruction of private property directly or through agent invariably a taking).

[11] District court opinion, appendix B, 8a.

statute compels the state to sacrifice itself in this way. Florida passed a mirror image statute to the federal Plant Protection Act,[12] not because it could then act alone or deviate from the federal law or the authority of the secretary, but because the Plant Protection Act required the state to do so.[13]

The state and the USDA created the CCEP, which has joint headquarters in Plantation, Florida, has joint federal and state directors and senior staff, has joint buildings and equipment, and has a joint risk assessment group that decides which trees to destroy.[14] Neither government cuts down trees; contractors cut down trees.[15]

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[12] District court opinion, appendix B, 8a.

[13] 7 U.S.C. § 7751(b)(1). The secretary may likewise command the state to provide the facilities and other resources to carry out the secretary's duty to eradicate plant pests. 7 U.S.C. § 7751(b)(2).

[14] District court opinion, appendix B, 5a-6a. A joint federal and state committee determines the trees to be destroyed. Circuit record A1708, 1716, 1724.

[15] District court opinion, 7a. The contracts to destroy trees are jointly approved by the state and federal authorities. Action plan for 2000, circuit record A346, A348, A375-76.

The district court characterized all of this as no more than "advising the state"[16] or as "technical assistance or recommendations,"[17] but the joint written agreements governing the CCEP explicitly provide that the USDA decides with the state which trees will be cut down and that the United States will join in destroying them.[18] The United States "participates with [Florida] in destroying citrus canker host plants. . . ."[19]

The state in 2000 adopted a USDA study that argues that every healthy citrus tree found within 1900 feet of a diseased tree must be destroyed to stop the spread of citrus canker. The plaintiffs challenge the science behind the study, which is

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[16] District court opinion, 6a ("advisory panels convened by [Florida] to assist in the development of policy").

[17] District court opinion, 22a

[18] The district court opinion would suggest that only one agreement, a memorandum of understanding, set the relationship of the two governments. District court opinion, 8a. This is incorrect. The memorandum and all other governing documents explicitly reserved to the secretary joint action to destroy trees.

[19] Joint work plan for 2000, circuit record A346.

deeply flawed. Under the rule, more than 2.5 million citrus trees have been destroyed, and many more will be. A radius of 1900 feet takes in more than 240 acres. It will destroy as many as 39,000 healthy citrus trees for every tree claimed to be diseased.

Sometimes the state for political reasons strays from this rule to exempt a favored grove. The federal co-director then writes a stern letter reminding the state who is in charge and invites the state to explain to the owner that the USDA makes these decisions.[20] The agreements, operating manuals, work plans, and memoranda that the state and the USDA execute to govern the CCEP require them to act jointly, especially in cases where they might by their actions create liability for the CCEP.[21] The district court's opinion suggests that the United States exercises only soft oversight of the destruction of trees, which no one could contend would lead to

[20] M. Hornyak, federal co-director, to R. Gaskalla, state co-director, circuit record A838-39. M. Hornyak to R. Gaskalla, circuit record A836-37 (state cannot act alone when action might subject both state and United States to liability).

[21] M. Hornyak, federal co-director, to R. Gaskalla, state co-director, circuit record A836-37.

liability, but the governments themselves are keenly aware that they are doing much more than that.[22]

Judge J. Leonard Fleet, a Florida trial judge acting under his state's *Frye* rule, held in another case that the science behind the 1900-foot rule was fundamentally flawed and unreliable.[23] The Florida Supreme Court reversed. It reasoned that because the Florida Legislature had embraced by statute the 1900-foot rule and the USDA science, judicial scrutiny of the science was reduced to a rational basis test.[24] This departed from *Lucas v. South Carolina Coastal Council*[25]and the Florida cases following *Lucas*, which hold that the state may not burden a property with nuisance claims, then expect the courts to give a pass to the science behind them.

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[22] District court opinion, 21a (funding, oversight of how funds are spent, "shared oversight in operations").

[23] *Haire v. The Florida Department of Agriculture and Consumer Services*, __ So.2d __, 2004 Westlaw 252015 (Fla. February 12, 2004).

[24] *Id.* at Westlaw 8.

[25] 505 U.S. 1003 (1992).

Not even a state legislature may declare that henceforward in Indiana the value of π shall be greater than nine.[26]

Many of these facts do not appear in the district court's decision and depend on *de novo* review of the record.[27] The district court's opinion did not describe the most central facts of joint control between the two governments.

Reasons for Granting the Petition

The jurisdiction of the federal circuit often allows it to rule on the takings liability of the United States. Under circuit decisions in *Langenegger*, *Hendler*, and *Presault*,[28] the United States is liable when it orders or collaborates with the state to cause an entry upon private land to commit a taking. It makes no difference when governments cooperate in this way that

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[26] P. Beckmann, The Story of Pi 174-177 (1993).

[27] *Adikes v. S.H. Kress and Co.*, 398 U.S. 144 (1970).

[28] *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985); *Hendler v. United States*, 952 F.2d 1525 (Fed. Cir. 1996); *Presault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc).

sometimes they divide their labor and that one partner is sent to do the last act in the taking.[29]

Florida law is in thrall to the federal statute and the secretary's power.[30] The USDA has exclusive and preemptive jurisdiction over every plant pest. All plant pests dwell in interstate commerce; no state shall interfere with the regulation of plant pests by the secretary.[31]

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[29] *Langenegger v. United States*, 756 F.2d at 1570 (United States liable "even when its action is not the final direct cause of the property loss or damage"); *Pendleton v. United States*, 47 Fed. Cl. 480, 485 (2000) (joint actions of federal and local governments require determination whether one or both liable for a taking, regardless who did the act); *see*, *Presault v. United States,* 100 F.3d 1525, 1551 (Fed. Cir. 1996)(en banc) (whether state might have acted entirely under its own law irrelevant if United States participates in taking).

[30] Despite the explicit finding in the act in 7 U.S.C. § 7701(9) that all plant pests are in interstate commerce, the district court refused to adopt "this reading" or "interpretation," because it would "render all intrastate pest control provisions meaningless because all plant pests would be considered interstate." District court opinion, 16a. This of course is precisely what the Congress has said.

[31] 7 U.S.C. § 7756(b)(1) and (2).

The secretary will require the state to provide those "facilities and means" to destroy plant pests "as the secretary deems necessary."[32] The act requires the states to authorize by legislation if necessary the entry onto private land to destroy plant pests,[33] but this authority appears in fact to be quite unnecessary, because the secretary already has authority to enter any premises in the United States.[34] Demanding that the state duplicate this authority simply adds a belt to suspenders. This is not a state acting under state law, but a state acting under state law acting under federal law.

If every plant pest is always in interstate commerce,[35] nothing more is needed for a further movement in interstate commerce than the soft breeze that wafts canker bacteria from one tree

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[32] 7 U.S.C. § 7751(b)(2).

[33] 7 U.S.C. § 7751(b)(1).

[34] 7 U.S.C. § 7731(c).

[35] 7 U.S.C. § 7701(9).

to its neighbor.[36] A state may legislate on plant pests only in conformity with federal law and to further the intentions of the secretary.[37] To say, as the district court said here, that the Plant Protection Act yields a bright line between interstate and intrastate commerce[38] is true only in the sense that every plant pest is on the federal side of the line.

Relations between the secretary and the Florida authorities—which the district court described as carried on under state law[39]—are in fact conducted in brutal episodes of federal *realpolitik*. When the state balks at what the secretary demands, the federal co-director will threaten "to turn Florida into a juice state."[40] This means a Florida that ships only juice. Since

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[36] 7 U.S.C. § 7702(9).

[37] 7 U.S.C. § 7756(b)(1),(2).

[38] District court opinion, 10a-11a.

[39] District court opinion, 20a.

[40] Richard Gaskalla, state CCEP co-director, declaration, circuit record A809-A810 ¶ 20, deposition A1086-1088.

Florida ships vast amounts of fresh fruit, its producers are thereby out of business. This threat was first made ten years ago, and nothing has changed.[41]

When the balance of authority between the United States and the several states is disturbed, it is not necessarily because the United States burdens a citizen directly, because the United States may be given by Congress the power to compel the state to do so. The state that is pushed out in front becomes ostensibly the sole party at risk for a taking, because once it enacts an authorizing statute as required by federal law, it will be argued by the United States to act alone.

An undifferentiated concern for making the United States too responsible for its actions leads to cases like these, where a district court's decision stands against the federal circuit's law, but the federal circuit manages to affirm *per curiam*. If the principles of agency, however apt, implicate the United States too deeply in takings liability, the federal courts have not been

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[41] Gaskalla deposition, circuit record A1087-1088.

able to say why,[42] and the federal circuit will apply—or it will not apply—its own decisions, but unevenly and without explanation.

Respectfully submitted,

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[42] The district court could only say that vicarious liability would lead to an unprecedented expansion of the liability of the United States. This is true not in the sense that the law would change, but that there has been a proliferation of episodes where the United States has compelled the state to commit an unmistakable taking—entry onto private land to destroy private property under the guise of acting against a nuisance.

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED NOVEMBER 12, 2003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1223

VICTORIO J. MARTINEZ, OFIR MARTINEZ, JOSEPH S. GRIFFIN, COLLEEN GRIFFIN, VERNER R. GLENN, JANIE E. GLENN, JOHN S. WADE, JR., and IRIS RILEY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Florida

IN CASE NO(S). 02-CV-20129

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

Appendix A

Per Curiam (RADER, BRYSON, and LINN, *Circuit Judges*)

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED NOV 12 2003

APPENDIX B — ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT FILED JANUARY 9, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 02-20129-CIV-HUCK

VICTORIO J. MARTINEZ; OFIR MARTINEZ; JOSEPH S. GRIFFIN; COLLEEN GRIFFIN; VERNER R. GLENN; JANIE GLENN; JOHN S. WADE, JR.; and IRIS RILEY, for themselves and others similarly situated,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court on Defendant United States of America's ("United States") Motion to Dismiss or, in the alternative, for Summary Judgment ODE # 48], filed July 23, 2002, and Plaintiffs' Cross Motion for Summary Judgment [DE # 59], filed September 23, 2002.

Appendix B

The Court has considered these Motions, the parties' respective responses and replies, together with the parties' Local Rule 7.5 Statements of Fact and pertinent portions of the record. In addition, the parties were before the Court for oral argument on these matters on December 19, 2002. At the oral argument, the parties agreed that there are no material facts in dispute and that the Court can properly resolve this case on the parties' cross-motions for summary judgment, Accordingly, for the reasons set forth below, the United States' Motion for Summary Judgment is GRANTED, and Plaintiffs' Cross Motion for Summary Judgment is DENIED.[1]

I. BACKGROUND

A. *Introduction*

This case arises as a result of the United States' involvement in the ongoing battle against citrus canker being waged in Florida. Plaintiffs are residents of Florida whose citrus trees were removed as part of a plan to eradicate citrus canker. Plaintiffs bring this adverse condemnation action under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), on behalf of themselves and others similarly situated, against the United States alleging that the removal of citrus trees from their private property constitutes a taking by the United States without just compensation under the Fifth Amendment of the United States Constitution.[2]

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1. This Order will not reach the question of whether there has been a taking because the Court has concluded that, if there was a taking, Florida, not the federal government is legally responsible.

2. Similar actions have been filed in state court against Florida for its part the alleged takings.

Appendix B

Citrus canker, as it is commonly called, is an agricultural plant disease caused by strains of the *Xanahomonas axonopodis pv. citri* bacterium. *See* 7 C.F.R. § 301.75-1. Citrus canker is believed to have originated in southeastern Asia and first appeared in Florida in 1910. The most recent outbreak of citrus canker began in Miami-Dade County, Florida, in 1995.

While this disease poses no health risk to humans or animals, it presents a very real threat to citrus trees. The effects of citrus canker include defoliation, dieback, severely blemished fruit, reduced fruit duality, and premature fruit drop. *See* 67 Fed. Reg. 30,769 (May 8, 2002); *see also Florida Dep't of Agric. fc Consumer Servs. v. City of Pompano Beach*, 792 So. 2d 539, 541-542 (Fla. Dist. Ct. App. 2001) (describing the effects of citrus canker). It is believed that the spread of citrus canker to commercial citrus groves will have a devastating effect on Florida's fresh citrus industry. *Id.* at 452.

B. *The United States' Involvement in the Citrus Canker Eradication Program*

In 1995, when citrus canker was detected in Miami-Dade County, the State of Florida, acting through the Florida Department of Agriculture and Consumer Services ("FDACS") and with some limited assistance of the United States, immediately began an eradication effort. This eradication effort, which was dubbed the Citrus Canker Eradication Program, or CCEP, included the surveying of trees to locate citrus canker, the regulating of businesses to prevent the spread of the disease, and the identification and

removal of citrus tree deemed to be infected with, or exposed to, citrus canker. In the first few years, the United States Department of Agriculture ("USDA") provided approximately $6 million to Florida for this effort. *See* 64 Fed. Reg. 13,540 (Mar. 19, 1999). In March 1999, the Secretary of the USDA issued a declaration of emergency authorizing the transfer of funds from other USDA programs to the eradication effort in Florida. *See id.* In 2000 and 2001, the federal government contributed over $100,000,000 to this project.

In addition to funding, the United States committed numerous federal employees to the CCEP. Some of these federal employees participated in advisory panels convened by the FDACS to assist in the development of policy. These advisory panels, comprised of both state and federal employees, provide recommendations to the Commissioner of the FDACS regarding scientific and regulatory matters. For example, three federal employees serve on the Citrus Canker Risk Assessment Group ("CCRAG"). The CCRAG is a "group of scientists and regulatory officials with knowledge of citrus canker disease and its eradication appointed by the director [of the FDACS' Division of Plant Industries] to make biologically sound recommendations for the control and eradication of citrus canker in the state." Fla. Admin. Code § 5B-58.000(1)(e).

Other federal employees participated in research efforts for the CCEP, including the determination that citrus trees within 1900 feet of an infected tree were at risk for contracting citrus canker (the "1900-foot policy"). Pursuant to this research, the CCRAG recommended that to the

Commissioner of the FDACS adopt the 1900-foot policy for the removal exposed trees in South Florida. In January 2001, the Commissioner of the FDACS adopted this recommendation and determined that, as a matter of state policy, all trees within 1900 feet of a visibly infected tree were exposed and had to be removed. *See City of Pompano*, 7972 So. 2d at 542.

Also, a number of federal employees served as surveyors and plant pathologists, diagnosing citrus canker on individual properties. While the vast majority of plant pathologists are state employees, the United States employed at least three pathologists that participated in the CCEP. Once a tree is located which a surveyor believes may be infected with citrus canker, the surveyor sends a sample from the tree to a plant pathologist. The plant pathologist determines whether the sample from the tree is infected with citris canker. If citrus canker is detected in the sample, the pathologist's findings are forwarded to the FDACS for further action. The FDACS then issues an Immediate Final Order ("IFO") to the property owner indicating that trees on the property will be removed and contracts with a private tree removal service for the removal of the trees.

II. STATUTORY AND REGULATORY AUTHORITY

Collaborative operations involving both state and federal agencies are common in the United States. These operations allow both governments to pool expertise and resources in pursuit of a common goal, such as eradication of citrus canker. As discussed below, both the federal law and Florida law enable the two governments to collaborate with each

other in projects like the CCEP. In fact, at all times relevant here, a Memorandum of Understanding was in effect between the FDACS and the USDA's Animal and Plant Health Inspection Services ("APHIS"), which provides the scope and terms of the United States' cooperation with Florida "to protect agricultural, horticultural, and timber resources from losses caused by plant pests." (Mem. of Understanding, Art. 1.) In addition, during 2000 and 2001, the USDA entered into a series of cooperative agreements with the FDACS that provided federal funding, personnel, and technical assistance for the eradication effort in Florida.

While this collaboration is helpful, it is not required. Each government's law, given the proper circumstances, authorizes it to act independently of the other to effectuate the removal of citrus trees in Florida. The following is a summary of the relevant statutory and regulatory authority:

A. *Florida State Law*

Under Florida law, the authority to regulate plant pests within Florida is delegated to the FDACS. The FDACS has the authority to:

- "declare a plant pest . . . a nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection . . ." Fla. Stat. §§ 581.031(6);

- "enter into cooperative agreements with any person . . . including the United States Department of Agriculture . . ." Fla. Stat. § 581.031(9);

Appendix B

- "inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests . . . and for this purpose . . . to enter into or upon any place and . . . take possession of such material if determined by the department to pose a threat to the agricultural or public interests of the state." Fla. Stat. § 581.031(15a);

- "supervise, or cause to be supervised, the treatment, cutting; and destruction of plants, plant parts . . . and other articles capable of harboring plant pests . . . If they are infested or located in an area which may be suspected of being infested or infected due to it proximity to a known infestation . . . and make rules governing these procedures . . ." Fla. Stat. § 581.031(17); *see generally* Fla. Stat. § 570.07 (describing general authority of FDACS); and

- conduct "plant pest . . . eradication and control programs and all plant pest surveys associated with eradication and control" through the FDACS's Division of Plant Industry ("DPI"). *See Fla.* Stat. § 570.32(6).

The state legislature has also granted FDACS the authority to declare a plant pest or its host a "nuisance." Fla. Stat. § 581.031(6). Pursuant to this authority, FDACS has declared citrus canker to be a plant pest and nuisance "capable of causing serious damage to citrus." 5 Fla. Admin. Code § 5B-58.001(3). This rule also declares that any article harboring citrus canker, including citrus trees, is a nuisance. *See id.* The declaration of a plant pest as a nuisance is considered to be an "emergency" under Florida law. *See* § 581.111.

Appendix B

At all time relevant to actions alleged in the Complaint, Florida law also permitted FDACS to "adopt specifying facts and circumstances that, if presented, would require the destruction of plants for the purpose of eradicating, controlling, or preventing the dissemination of citrus canker disease in [Florida]." Fla. Stat. § 581.184(2). Under this and other authority, FDACS promulgated regulations mandating that all infected and exposed citrus trees be destroyed.[3] *See* Fla. Admin. Code § 58.001(5)(a). Pursuant to this statutory authority, the Commissioner of FDACS determined that all trees within 1900 feet of a visibly infected tree were exposed. *See City of Pompano Beach*, 792 So. 2d at 542.

B. ***Federal Law***

The USDA, through its Secretary, has the authority to regulate plant pests, such as citrus canker, pursuant to the Plant Protection Act of 2000 ("PPA"). *See* 7 U.S.C. § 7701 *et seq.* According to the United States, although the PPA was passed in 2000, its provisions were previously found in other sections of Title 7. In summary, the PPA's statutory scheme divides the USDA's mandate into two primary spheres. The first sphere involves the USDA's regulation and control of the foreign and interstate movement of plant pests and their hosts. Within the sphere, the USDA has primary authority. *See Id.* §§ 7711(a), 7712(a).

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3. Infected citrus trees are defined as those trees harboring the citrus canker bacteria and expressing visible symptoms. Fla. Admin. Code §§ 5B-58.001(1)(i). Exposed trees are defined as those trees "[d]etermined by the department to likely harbor citrus canker bacteria because of proximity to infected plants, or probable contact with personnel, or regulated articles, or other articles that may have been contaminated with bacteria that cause canker, but not expressing visible symptoms." Fla. Admin. Code § 5B-58.001(1)(h).

Appendix B

The second sphere involves the regulation and control of plant pests found within the borders of a state. The PPA recognizes that the primary authority for the regulation and control of intrastate plant pests resides with the state government. Accordingly, the USDA has authority to enter into cooperative agreements with state governments to prevent the introduction and spread of plant pests or to eradicate plant pests. *See* 7 U.S.C. § 7751(a). The USDA also has authority, upon its *declaration of* an emergency that "a plant pest . . . threatens any segment of the agricultural production of the United States to transfer funds from other agencies of the USDA for the "arrest, control, eradication, and prevention of the spread of plant pests . . . ." *Id.* § 7772(a).

In addition, the Secretary of Agriculture has the power, upon the declaration of all 'extraordinary emergency,' to order the destruction of plant pests or their hosts, wherever located. *See* 7 U.S.C. § 7715(a)(1). However, such a declaration can only be exercised under unique and specific circumstances. First, the PPA allows the Secretary to act under this provision "only upon finding, after review and consultation with the Government or other appropriate official of the State affected, that the measures being taken by the State arc inadequate to eradicate the plant pests . . . ." *See* 7 U.S.C. § 7715(b). Next, the Secretary must "notify the Governor or other appropriate official of the States affected, issue a pubic announcement, and file for publication in the Federal Register a statement of (A) the Secretary's findings; (B) the action the Secretary intends to take; (C) the reasons for the intended action; and (D) where practicable, an estimate of the anticipate duration of the extraordinary emergency." *See* 7 U.S.C. § 7715(c)(1).

III. SUMMARY JUDGMENT STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), the United States moves for summary judgment on the basis that Plaintiffs cannot state a Fifth Amendment takings claim against it. Under Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment may be entered only where there is no genuine issue of material fact. *See Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598 (1970). In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Id.* at 157.

Once this standard is met, the burden shifts to the non-moving party to demonstrate through the production of probative evidence that there remains an issue of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In order to meet this burden, the non-moving party must go beyond the pleadings and show "by her own affidavits, or by the 'depositions, answers to interrogatories,

or admissions on file'" that a genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (quoting Fed. R. Civ. P. 56(e)). If the record, taken as a whole, can reasonably lead to only one conclusion, then there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See Anderson*, 477 U.S. at 247-52.

IV. ANALYSIS

The framework for determining the United States' liability for acts underlying Plaintiffs' takings claim is set forth in federal law. *See Griggs v. County of Allegheny*, 369 U.S. 84, 88-90 (1962); *B & G Enter., Ltd. v. United States*, 220 F.3d 1318, 1323-1325 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001); *Preseault v. United States*, 100 F.3d 1525, 1550-1552 (Fed. Cir. 1996) (*en banc*); *Blue v. United States*, 21 Cl. Ct. 359, 362-63 (1990); *Hendler v. United States*, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991); Custom *Contemporary Homes v. United States*, 5 Cl. Ct. 88, 90-92 (1984).

When reviewing a takings claim that involves action by both federal and state governments, courts must: (1) identify the legally relevant action that gave rise to the alleged taking and (2) determine whose legal authority authorized that action. *See Brubaker Amusement Co. v. United States*, 304 F.3d 1349 (Fed. Cir. 2002); *B & G*, 220 F.3d at 1318; *Preseault*, 100 F.3d at 1550-52; *Hendler*, 952 F.2d at 1378-79. Legally relevant action is determined by reference to the statutory and regulatory authority; it does not include federal funding in exchange for compliance with federal standards, recommendations made by federal employees, federal

technical assistance, federally funded research, or federal oversight of federally funded projects. *See Griggs*, 369 U.S. at 85-86; *B & G*, 220 F.3d at 1323-24; *Blue*, 21 Cl. Ct. at 362-63; *Custom Contemporary*, 5 Cl. Ct. at 91-92.

There are two theories under which the federal government can incur takings liability in a joint federal/state program:

(A.) *Actions is Pursuant to Federal Law*: If federal law directly authorized the legally relevant action that gave rise to the takings claim, then the federal government bears responsibility for those actions. *See Preseault*, 100 F.3d at 1551; *Hendler*, 952 F.2d 1378-79.

(B.) *State is Acting as an Agent of the Federal Government*: If federal law did not directly authorize the legally relevant action, it may still bear responsibility where another sovereign, in authorizing the relevant acts, was operating as an agent of the federal government. *See B & G*, 220 F.3d 1324; *Hendler*, 952 F.2d 1378; *see also Custom Contemporary*, 5 Cl. Ct. at 90 ("the United States cannot be held liable if private property is taken by the action of a State or local government entity") (citing *Griggs*, 369 U.S. at 88); *Blue*, 21 Cl. Ct. at 362 (same). The Court will analyze both of these theories, in turn.

A. *Whether Federal Law Authorized the Alleged Taking*

The alleged taking occurred when Plaintiffs' citrus trees were removed and destroyed. The United States argues that Florida, acting through the FDACS and pursuant to Florida

law, ordered the removal and destruction of Plaintiffs' trees and contracted with the independent tree cutting services to remove the trees. Accordingly, the United States contends that Florida, and Florida alone, is responsible for any taking that may have resulted from these action.

In support of this contention, the United States points to the relevant state and federal statutory frameworks to argue that only Florida has the legal authority to order the destruction of Plaintiffs' trees. As indicated above, the FDACS has the authority, under Florida law, "to adopt rules specifying facts and circumstances that, if present, would require the destruction of plants for purposes of eradicating, controlling, or preventing the dissemination of citrus canker disease in [Florida]." *See* Fla. Stat. § 581.184(2). Moreover, pursuant to this authority, FDACS promulgated regulations mandating that all infected and exposed citrus trees were subject to *removal. See* Fla. Admin. Code § 5B-58.001(5)(a); *see also*, *supra*, Part II.A.

United States argues that it is without legal authority, on the facts of this case; to cut down trees on private property in Florida. According to the United States, the ultimate decision to cut down trees in Florida constitutes an intrastate plant pest control action, and, under the PPA and prior federal law, the primary authority to regulate and control interstate plant pests resides with the state not the federal government. *See*, *supra*, Part II.B. The only in situation in which the Secretary of the USDA would have the authority to order the destruction of intrastate plant pests or their hosts would be upon the declaration of an "extraordinary emergency" under the PPA. It is undisputed that no such declaration has been made.

Appendix B

In Response, Plaintiffs challenge the contention that federal law has not authorized the United States to destroy Plaintiffs' trees. Under Plaintiffs' interpretation of the PPA, and earlier federal statutory authority, citrus canker would constitute an interstate plant pest based on the finding that "all plant pests . . . regulated under this title are in or affect interstate commerce." 7 U.S.C. § 7701(9). Under this reading, the USDA would have plenary authority to regulate all plant pests and would not need to declare an "extraordinary emergency." The Court, however, cannot accept Plaintiffs' interpretation of the PPA. Such an interpretation would render all intrastate pest control provisions meaningless because all plant pests would be considered interstate.

Upon review of the relevant statutory authority, the Court finds that Florida law, not federal law, authorized the destruction of Plaintiffs' citrus trees. The Court finds the United States' argument, that it was without statutory authority, under these (acts, to order the destruction of the trees, persuasive. However, even if the United States had such authority, the Court finds that the United States did not use it, opting instead to allow Florida, pursuant to state law, to effectuate the removal of the trees. This decision is evidenced by the Memorandum of Understanding between the USDA and the FDACS and the IFO issued to each landowner prior to the removal of his or her citrus trees.

As stated earlier, the Memorandum of Understanding defines the scope and terms of the USDA's cooperation with the FDACS. Article 4 of the Memorandum indicates that the FDACS is responsible for all pest control actions, that such activities will be conducted by the FDACS pursuant to

Florida law. It provides, in relevant part, as follows: The FDACS agrees to:

* * *

> c. Authorize specific [USDA] APHIS plant protection and quarantine personnel to enter upon private property when necessary for the purpose of conducting inspections and exercising state pest control authority. During the course of these activities, APHIS plant protection and quarantine personnel shall always be under the control and direction of the FDACS. ***Pest control actions, including hold orders and seizures, shall be taken by [the] FDACS and action shall be conducted under its supervision. All such activities shall be conducted in accordance with s 581.031 (24), Florida Statutes.***

(emphasis added).

The IFO is printed on FDACS letterhead and provides as follows:

* * *

> The Florida Constitution gives the Commissioner of Agriculture authority over matters pertaining to agriculture. Sections 570.071(21), 581.031(6)(7), and 581.111, Florida Statutes, grant the Commissioner authority to declare an emergency and to enact emergency rules to deal with the emergency.

Appendix B

Because citrus canker is an immediate, serious danger to the citizens of Florida, the Commissioner has declared an agricultural emergency and enacted emergency Rule 5B-58.001 which establishes a quarantine area, specifies procedures for treatment an eradication of citrus canker, and prohibits the planting or movement of citrus without permission of the Department. The existence of citrus canker in the state is an immediate, serious danger to the health, safety and welfare of Florida. The [FDACS] must take the necessary steps to eradicate it. The [FDACS] will need your assistance to control and eradicate this serious plant disease.

Unfortunately, the [FDACS] has found trees on you property which are infected with citrus canker or determined to be exposed to the disease. To prevent the spread of the disease in your neighborhood, do not cut down or prune your citrus trees, move your citrus plans or citrus plant materials, including fruit, or plant any new citrus trees without permission of the [FDACS]. ***In order to eradicate this disease, representatives of the [FDACS], under the authority of Section 581.184, Florida Statutes, will:***

1. ***remove any infected trees or exposed trees,***

2. dispose of the plant materials in a safe matter, and

3. apply an appropriate and approved herbicide to the remaining stump in order to prevent regeneration which could harbor the bacterium that causes citrus canker.

This entire process will be paid by the state at no expense to you.

* * *

Please note that you have important legal rights ***under Florida law to contest this Immediate Final Order***. Please refer to the notice of rights attached to this letter. . . .

NOTICE OF RIGHTS

This letter constitutes an Immediate Final Order to you and is effective immediately. If you do not agree with this Order, it is immediately appealable or enjoin able (sic). ***An appeal may be institute by filing the original of a Notice of Appeal with the Clerk, Florida Department of Agriculture and Consumer Services***, Mayo Building, Room 509, Tallahassee, Florida, 323990804, within 30 days of the date of this order, and filing a copy of the Notice of Appeal, accompanied by the filing fee prescribed by law, with the Clerk of the appropriate District Court of Appeal. This appeal must be conducted in accordance with the Florida Rules of Appellate Procedure. ***An action for injunctive relief may be filed in the appropriate Circuit Court.***

(IFO Addressed to Plaintiffs Verner R. and Janie E. Glenn, dated May 9., 2000) (emphasis added). These two documents,

the Memorandum and the form IFO, indicate that the United States took measured steps to ensure that the final decision to destroy plant pests, such as citrus canker, and their hosts on private property would be made by the FDACS pursuant to Florida law. Since this relevant action was taken by Florida pursuant to state law, Plaintiffs' claim fails to fall within the first theory under which the United States can incur takings liability in a joint federal/state program.

B. *Whether Florida Acted as the United States' Agent*

Under the second theory, in order for the United States to be held responsible for relevant action authorized by state law, Plaintiffs must prove a relationship whereby Florida was operating as an agent of the United States in authorizing that action. *See B & G*, 220 F.3d at 1324; *Hendler*, 952 F.2d at 1378.

In arguing that Florida was acting as an agent of the United States, Plaintiffs point to the United States' involvement in the CCEP and its influence over Florida's decision-making process. It is undisputed that the United States contributed in excess of $100,000,000 to the CCEP in 2000 and 2001. It is also undisputed that federal employees participated in the process that led to the state's final determination to remove citrus trees deemed infected *with or exposed* to citrus canker. This participation ranged from recommendations to the FDAACS regarding policy to the actual diagnosis of citrus canker on individual properties. *See*, *supra*, Part I.B. However, for the reasons discussed below, the Court concludes that this involvement is insufficient, as a matter of law, to render the federal

government responsible for Florida's actions in ordering the removal of Plaintiff's trees.

(1) Federal Funding to Florida

The record indicated that the United States provided funding to help eradicate citrus canker in Florida. In exchange for financial support, the United States participated in determining how its resources were implemented. This included involvement in policy-making and shared oversight in the operations of the CCEP. However, federal funding in a joint federal/state program is an insufficient basis to hold the federal government responsible for a Fifth Amendment takings claim that arose out of the state's action in the program. *See Griggs*, 369 U.S. at 89; *B & G*, 220 F.3d at 1323-24; *Adolph v. Federal Emergency Mgmt. Agency*, 854 F.2d 732, 736 (5th Cir. 1988); *Custom Contemporary*, 5 Cl. Ct. at 91; *Lenoir v. United States*, No. 104-79L, 1979 WL 30789, at *2 (Cl. Ct. Dec. 7, 1979); *Pendleton v. United States*, 47 Fed. Cl. 480, 485 (2000). This is so regardless of whether the federal government requires that a state government pass certain legislation, comply with federal standards in order to obtain funding, or submit to federal oversight. *See B & G*, 220 F.3d at 1323-24 (holding that no takings claim could lie against the United States on the basis of the federal government's offer of funds in exchange for compliance with federal requirements and oversight); *Adolph*, 854 F.2d 735-36 (holding that the conditioning of federal funds on the enactment of local land use ordinances in compliance with federal standards cannot give rise to takings claims when the ordinances were the cause of the alleged taking); *Custom Contemporary*, 5 Cl. Ct. at 91

(holding as insufficient to state a taking claim against the federal government the fact that federal government provided federal funding in exchange for compliance with federal law as well as extensive federal involvement in the project, including (1) approving the highway location that would require acquisition of private property, and (2) authorizing the state to begin right of way acquisitions); *Lenoir*, 1979 WL 30789, at *2 (holding that federal assistance in funding, planning, and inspection (oversight) of watershed project, which was alleged to be the cause of taking, was insufficient to convert state program into federal or to attribute taking claim to federal government); *D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505, 507-08 (Ct. Cl. 1967) (holding that requiring state government to comply with federal standards *to* obtain federal funds did not create agency relationship or cause alleged taking to be attributed to federal government); *Pendleton*, 47 Fed. Cl. 483, 485 (holding that even though federal law required state plan to satisfy federal law and standards and federal government provided other oversight of state government's use of federal funds, no taking claim could be brought against federal government). Accordingly, the United States' financial support of the CCEP is insufficient, as a matter of law, to make it liable for Florida's actions in ordering the removal of citrus trees.

(2) Federal Participation in the CCEP

Like funding, direct federal participation in a joint federal/state program, in the form of technical assistance and recommendations, is insufficient to hold the United States liable for the state's actions that give rise to a takings claim. For example, in *Blue v. United States*, the Federal Claims

Appendix B

Court reviewed the actions of the United States Navy in recommending and persuading a local county zoning board to pass a particular zoning ordinance under state law. *See* 21 Cl. Ct. 359, 362 (1990). In doing so, the Navy invoked its statutory authority to (1) provide technical advisors to sit on a zoning advisory committee created by the county to make recommendations about the new zoning ordinance; (2) disseminate a study concerning land use near a military airport; (3) present a draft zoning ordinance to the county board and lobby on the draft's behalf; (4) discuss other draft ordinances with county staff; and (5) provide various other recommendations related to the rezoning to the county board. *See id.* at 360-61. The ordinance that the county ultimately passed was almost identical to the federal government's draft. *See id.* at 361. Regardless of the amount of influence that the federal government exercised, the court found no liability on the part of the federal government, concluding that the relevant act with, respect to the alleged taking was the passage of the ordinance by the county. *See id.* at 362. The court explained: "[t]he county was free to reject all or part of the Navy's recommendation[, and as such, the] 'United States cannot be held liable if private property is taken by the action of the state or local government entity.'" *Id.* (quoting *Custom Contemporary*, 5 Cl. Ct. at 90); *see also Lenoir*, 1979 WL 30789, at * 1 (holding that takings claim could not lie against federal government even though federal employees provided, among other things, technical assistance in the construction of flood control project, which was the basis of plaintiff's takings claim); *DeTom Enter., Inc. v. United States*, 552 F.2d 337, 339-40 (Ct. Cl. 1977) (holding even when independent sovereign acts after being convinced by federal government to do so, a takings claim does not lie against the federal government).

Appendix B

Similar to *Blue*, in this case, federal employees, conducted research, sat on advisory panels, and made recommendations to the state concerning the eradication of citrus canker. *See*, *supra*, at Part I.B. These recommendations do not give rise to Plaintiffs' takings claims. The FDACS still had the prerogative to accept or reject these recommendations, to promulgate regulations, to announce department policy, and, ultimately, to order the removal of trees. Accordingly, pursuant to the well-established body of takings law, the Court finds that the United States' participation in the CCEP insufficient to create an agency relationship between the United States and Florida with respect to the state's decision to remove Plaintiffs' citrus trees.

This does not, however, end the inquiry. Plaintiffs attempt to introduce a new theory, the common law of *joint* venture, into this agency analysis. According to Plaintiffs, the CCEP is a classic joint venture between the United States and Florida undertaken for the purpose of eradicating citrus canker in the Florida. Federal law clearly authorizes the USDA to work in cooperation with Florida "to eradicate, suppress, control, or to prevent or retard the spread of plant pests." *See* 7 U.S.C. § 147(a). In fact, the CCEP demonstrates that the United States entered into a cooperative agreement with Florida to eradicate citrus canker. Such cooperation, suggests Plaintiffs, should subject the United States to liability for its participation in the CCEP, which led to the eventual destruction of Plaintiff's trees.

A joint venture is an agreement for a common purpose or venture, with joint proprietary interest in its subject matter, a joint sharing of profit or losses, and joint authority and control. *Pinnacle Port Community Ass'n v. Orenstein*, 872 F.2d 1536, 1539 (11th Cir. 1989). Under Plaintiff's theory, once a joint

venture is established, liability attaches to each member of the joint enterprise for the acts of the other. In other words, each venturer is an agent of each other and of the joint venture itself: Plaintiffs contend that, if this joint venture theory is applied to the agency liability analysis above, Florida would be deemed an agent of the United States for all of the state's actions in the CCEP, subjecting the United States to takings liability for the FDACS' final order to remove Plaintiffs' trees. The Court cannot accept this reasoning as it would create unprecedented expansion of takings liability for the federal government. Under Plaintiffs' reasoning, the United States would be liable for all state action in a joint federal/state program. The Court finds such an expansion of the law unwise and inconsistent with the well-developed takings jurisprudence analyzed above.[4] Based on the foregoing, the Court finds that the United States is entitled to judgment as a matter of law. Accordingly, it is

ORDERED AND ADJUDGED that Defendant the United States of America's Motion for Summary Judgment [DE # 48-2] is GRANTED, and Plaintiffs' Cross Motion for Summary Judgment [DE # 59-1] is DENIED. All other pending motions are hereby DENIED AS MOOT.

DONE AND ORDERED in Miami, Florida, this 9th day of January, 2003.

s/ Paul C. Huck
Paul C. Huck
United States District Judge

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4. In so finding, the Court need not and, therefore, does not, for purposes of this opinion, determine whether the CCEP constitutes a true joint venture as Plaintiffs contend.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 18, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1223

VICTORIO J. MARTINEZ, OFIR MARTINEZ, JOSEPH S. GRIFFIN, COLLEEN GRIFFIN, VERNER R. GLENN, JANIE E. GLENN, JOHN S. WADE, JR., and IRIS RILEY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

Appendix C

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 25, 2004.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: February 18, 2004

APPENDIX D — RELEVANT STATUTES

7 U.S.C.A. § 7701

§ 7701. Findings

Congress finds that—

(1) the detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests or noxious weeds is necessary for the protection of the agriculture, environment, and economy of the United States;

(2) biological control is often a desirable, low-risk means of ridding crops and other plants of plant pests and noxious weeds, and its use should be facilitated by the Department of Agriculture, other Federal agencies, and States whenever feasible;

(3) it is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds;

(4) decisions affecting imports, exports, and interstate movement of products regulated under this title shall be based on sound science;

(5) the smooth movement of enterable plants, plant products, biological control organisms, or other articles into, out of, or within the United States is vital to the United State's economy and should be facilitated to the extent possible;

(6) export markets could be severely impacted by the introduction or spread of plant pests or noxious weeds into or within the United States;

(7) the unregulated movement of plant pests, noxious weeds, plants, certain biological control organisms, plant products, and articles capable of harboring plant pests or noxious weeds could present an unacceptable risk of introducing or spreading plant pests or noxious weeds;

(8) the existence on any premises in the United States of a plant pest or noxious weed new to or not known to be widely prevalent in or distributed within and throughout the United States could constitute a threat to crops and other plants or plant products of the United States and burden interstate commerce or foreign commerce; and

(9) all plant pests, noxious weeds, plants, plant products, articles capable of harboring plant pests or noxious weeds regulated under this title are in or affect interstate commerce or foreign commerce.

Appendix D

7 U.S.C.A. § 7702

§ 7702. Definitions

In this chapter:

(1) Article

The term "article" means any material or tangible object that could harbor plant pests or noxious weeds.

(2) Biological control organism

The term "biological control organism" means any enemy, antagonist, or competitor used to control a plant pest or noxious weed.

(3) Enter and entry

The terms "enter" and "entry" mean to move into, or the act of movement into, the commerce of the United States.

(4) Export and exportation

The terms "export" and "exportation" mean to move from, or the act of movement from, the United States to any place outside the United States.

Appendix D

(5) Import and importation

The terms "import" and "importation" mean to move into, or the act of movement into, the territorial limits of the United States.

(6) Interstate

The term "interstate" means—

(A) from one State into or through any other State; or

(B) within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

(7) Interstate commerce

The term "interstate commerce" means trade, traffic, or other commerce—

(A) between a place in a State and a point in another State, or between points within the same State but through any place outside that State; or

(B) within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

Appendix D

(8) Means of conveyance

The term "means of conveyance" means any personal property used for or intended for use for the movement of any other personal property.

(9) Move and related terms

The terms "move", "moving", and "movement" mean—

(A) to carry, enter, import, mail, ship, or transport;

(B) to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting;

(C) to offer to carry, enter, import, mail, ship, or transport;

(D) to receive to carry, enter, import, mail, ship, or transport;

(E) to release into the environment; or

(F) to allow any of the activities described in a preceding subparagraph.

Appendix D

(10) Noxious weed

The term "noxious weed" means any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.

(11) Permit

The term "permit" means a written or oral authorization, including by electronic methods, by the Secretary to move plants, plant products, biological control organisms, plant pests, noxious weeds, or articles under conditions prescribed by the Secretary.

(12) Person

The term "person" means any individual, partnership, corporation, association, joint venture, or other legal entity.

(13) Plant

The term "plant" means any plant (including any plant part) for or capable of propagation, including a tree, a tissue culture, a plantlet culture, pollen, a shrub, a vine, a cutting, a graft, a scion, a bud, a bulb, a root, and a seed.

Appendix D

(14) Plant pest

The term "plant pest" means any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product:

(A) A protozoan.

(B) A nonhuman animal.

(C) A parasitic plant.

(D) A bacterium.

(E) A fungus.

(F) A virus or viroid.

(G) An infectious agent or other pathogen.

(H) Any article similar to or allied with any of the articles specified in the preceding subparagraphs.

(15) Plant product

The term "plant product" means—

(A) any flower, fruit, vegetable, root, bulb, seed, or other plant part that is not included in the definition of plant; or

(B) any manufactured or processed plant or plant part.

Appendix D

(16) Secretary

The term "Secretary" means the Secretary of Agriculture.

(17) State

The term "State" means any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

(18) Systems approach

For the purposes of section 7712(e) of this title, the term "systems approach" means a defined set of phytosanitary procedures, at least two of which have an independent effect in mitigating pest risk associated with the movement of commodities.

(19) This chapter

Except when used in this section, the term "this chapter" includes any regulation or order issued by the Secretary under the authority of this chapter.

(20) United States

The term "United States" means all of the States.

Appendix D

7 U.S.C.A. § 7711

§ 7711. Regulation of movement of plant pests

(a) Prohibition of unauthorized movement of plant pests

Except as provided in subsection (c) of this section, no person shall import, enter, export, or move in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit and is in accordance with such regulations as the Secretary may issue to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.

(b) Requirements for processes

The Secretary shall ensure that the processes used in developing regulations under subsection (a) of this section governing consideration of import requests are based on sound science and are transparent and accessible.

(c) Authorization of movement of plant pests by regulation

(1) Exception to permit requirement

The Secretary may issue regulations to allow the importation, entry, exportation, or

movement in interstate commerce of specified plant pests without further restriction if the Secretary finds that a permit under subsection (a) of this section is not necessary.

(2) Petition to add or remove plant pests from regulation

Any person may petition the Secretary to add a plant pest to, or remove a plant pest from, the regulations issued by the Secretary under paragraph (1).

(3) Response to petition by the Secretary

In the case of a petition submitted under paragraph (2), the Secretary shall act on the petition within a reasonable time and notify the petitioner of the final action the Secretary takes on the petition. The Secretary's determination on the petition shall be based on sound science.

(d) Prohibition of unauthorized mailing of plant pests

(1) In general

Any letter, parcel, box, or other package containing any plant pest, whether sealed as letter-rate postal matter or not, is nonmailable and shall not knowingly be conveyed in the mail or delivered from any post office or by any mail

carrier, unless the letter, parcel, box, or other package is mailed in compliance with such regulations as the Secretary may issue to prevent the dissemination of plant pests into the United States or interstate.

(2) Application of postal laws and regulations

Nothing in this subsection authorizes any person to open any mailed letter or other mailed sealed matter except in accordance with the postal laws and regulations.

(e) Regulations

Regulations issued by the Secretary to implement subsections (a), (c), and (d) of this section may include provisions requiring that any plant pest imported, entered, to be exported, moved in interstate commerce, mailed, or delivered from any post office—

(1) be accompanied by a permit issued by the Secretary prior to the importation, entry, exportation, movement in interstate commerce, mailing, or delivery of the plant pest;

(2) be accompanied by a certificate of inspection issued (in a manner and form required by the Secretary) by appropriate officials of the country or State from which the plant pest is to be moved;

(3) be raised under post-entry quarantine conditions by or under the supervision of the Secretary for the purposes of determining whether the plant pest—

(A) may be infested with other plant pests;

(B) may pose a significant risk of causing injury to, damage to, or disease in any plant or plant product; or

(C) may be a noxious weed; and

(4) be subject to remedial measures the Secretary determines to be necessary to prevent the spread of plant pests.

Appendix D

7 U.S.C.A. § 7712

§ 7712. Regulation of movement of plants, plant products, biological control organisms, noxious weeds, articles, and means of conveyance

(a) In general

The Secretary may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States.

(b) Policy

The Secretary shall ensure that processes used in developing regulations under this section governing consideration of import requests are based on sound science and are transparent and accessible.

(c) Regulations

The Secretary may issue regulations to implement subsection (a) of this section, including regulations requiring that any plant, plant product, biological control organism, noxious weed, article, or means of conveyance imported, entered, to be exported, or moved in interstate commerce—

(1) be accompanied by a permit issued by the Secretary prior to the importation, entry, exportation, or movement in interstate commerce;

(2) be accompanied by a certificate of inspection issued (in a manner and form required by the Secretary) by appropriate officials of the country or State from which the plant, plant product, biological control organism, noxious weed, article, or means of conveyance is to be moved;

(3) be subject to remedial measures the Secretary determines to be necessary to prevent the spread of plant pests or noxious weeds; and

(4) with respect to plants or biological control organisms, be grown or handled under post-entry quarantine conditions by or under the supervision of the Secretary for the purposes of determining whether the plant or biological control organism may be infested with plant pests or may be a plant pest or noxious weed.

(d) Notice

Not later than 1 year after June 20, 2000, the Secretary shall publish for public comment a notice describing the procedures and standards that govern the consideration of import requests. The notice shall—

(1) specify how public input will be sought in advance of and during the process of promulgating regulations necessitating a risk assessment in order to ensure a fully transparent and publicly accessible process; and

(2) include consideration of the following:

(A) Public announcement of import requests that will necessitate a risk assessment.

(B) A process for assigning major/ nonroutine or minor/routine status to such requests based on current state of supporting scientific information.

(C) A process for assigning priority to requests.

(D) Guidelines for seeking relevant scientific and economic information in advance of initiating informal rulemaking.

(E) Guidelines for ensuring availability and transparency of assumptions and uncertainties in the risk assessment process including applicable risk mitigation measures relied upon individually or as components of a system of mitigative measures proposed consistent with the purposes of this chapter.

Appendix D

(e) Study and report on systems approach

(1) Study

The Secretary shall conduct a study of the role for and application of systems approaches designed to guard against the introduction of plant pathogens into the United States associated with proposals to import plants or plant products into the United States.

(2) Participation by scientists

In conducting the study the Secretary shall ensure participation by scientists from State departments of agriculture, colleges and universities, the private sector, and the Agricultural Research Service.

(3) Report

Not later than 2 years after June 20, 2000, the Secretary shall submit a report on the results of the study conducted under this section to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives.

Appendix D

(f) Noxious weeds

(1) Regulations

In the case of noxious weeds, the Secretary may publish, by regulation, a list of noxious weeds that are prohibited or restricted from entering the United States or that are subject to restrictions on interstate movement within the United States.

(2) Petition to add or remove plants from regulation

Any person may petition the Secretary to add a plant species to, or remove a plant species from, the regulations issued by the Secretary under this subsection.

(3) Duties of the Secretary

In the case of a petition submitted under paragraph (2), the Secretary shall act on the petition within a reasonable time and notify the petitioner of the final action the Secretary takes on the petition. The Secretary's determination on the petition shall be based on sound science.

Appendix D

(g) Biological control organisms

(1) Regulations

In the case of biological control organisms, the Secretary may publish, by regulation, a list of organisms whose movement in interstate commerce is not prohibited or restricted. Any listing may take into account distinctions between organisms such as indigenous, nonindigenous, newly introduced, or commercially raised.

(2) Petition to add or remove biological control organisms from the regulations

Any person may petition the Secretary to add a biological control organism to, or remove a biological control organism from, the regulations issued by the Secretary under this subsection.

(3) Duties of the Secretary

In the case of a petition submitted under paragraph (2), the Secretary shall act on the petition within a reasonable time and notify the petitioner of the final action the Secretary takes on the petition. The Secretary's determination on the petition shall be based on sound science.

Appendix D

7 U.S.C.A. § 7713

§ 7713. Notification and holding requirements upon arrival

(a) Duty of Secretary of the Treasury

(1) Notification

The Secretary of the Treasury shall promptly notify the Secretary of Agriculture of the arrival of any plant, plant product, biological control organism, plant pest, or noxious weed at a port of entry.

(2) Holding

The Secretary of the Treasury shall hold a plant, plant product, biological control organism, plant pest, or noxious weed for which notification is made under paragraph (1) at the port of entry until the plant, plant product, biological control organism, plant pest, or noxious weed—

(A) is inspected and authorized for entry into or transit movement through the United States; or

(B) is otherwise released by the Secretary of Agriculture.

Appendix D

(3) Exceptions

Paragraphs (1) and (2) shall not apply to any plant, plant product, biological control organism, plant pest, or noxious weed that is imported from a country or region of a country designated by the Secretary of Agriculture, pursuant to regulations, as exempt from the requirements of such paragraphs.

(b) Duty of responsible parties

(1) Notification

The person responsible for any plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance required to have a permit under section 7711 or 7712 of this title shall provide the notification described in paragraph (3) as soon as possible after the arrival of the plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance at a port of entry and before the plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance is moved from the port of entry.

(2) Submission

The notification shall be provided to the Secretary, or, at the Secretary's direction, to the

proper official of the State to which the plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance is destined, or both, as the Secretary may prescribe.

(3) Elements of notification

The notification shall consist of the following:

(A) The name and address of the consignee.

(B) The nature and quantity of the plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance proposed to be moved.

(C) The country and locality where the plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance was grown, produced, or located.

(c) Prohibition on movement of items without authorization

No person shall move from a port of entry or interstate any imported plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance unless the imported plant, plant product, biological control

organism, plant pest, noxious weed, article, or means of conveyance—

(1) is inspected and authorized for entry into or transit movement through the United States; or

(2) is otherwise released by the Secretary.

7 U.S.C.A. § 7714

§ 7714. General remedial measures for new plant pests and noxious weeds

(a) Authority to hold, treat, or destroy items

If the Secretary considers it necessary in order to prevent the dissemination of a plant pest or noxious weed that is new to or not known to be widely prevalent or distributed within and throughout the United States, the Secretary may hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of any plant, plant pest, noxious weed, biological control organism, plant product, article, or means of conveyance that—

(1) is moving into or through the United States or interstate, or has moved into or through the United States or interstate, and—

(A) the Secretary has reason to believe is a plant pest or noxious weed or is infested

with a plant pest or noxious weed at the time of the movement; or

(B) is or has been otherwise in violation of this chapter;

(2) has not been maintained in compliance with a post-entry quarantine requirement; or

(3) is the progeny of any plant, biological control organism, plant product, plant pest, or noxious weed that is moving into or through the United States or interstate, or has moved into the United States or interstate, in violation of this chapter.

(b) Authority to order an owner to treat or destroy

(1) In general

The Secretary may order the owner of any plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance subject to action under subsection (a) of this section, to treat, apply other remedial measures to, destroy, or otherwise dispose of the plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance, without cost to the Federal Government and in the manner the Secretary considers appropriate.

Appendix D

(2) Failure to comply

If the owner fails to comply with the Secretary's order under this subsection, the Secretary may take an action authorized by subsection (a) and recover from the owner the costs of any care, handling, application of remedial measures, or disposal incurred by the Secretary in connection with actions taken under subsection (a) of this section.

(c) Classification system

(1) Development required

To facilitate control of noxious weeds, the Secretary may develop a classification system to describe the status and action levels for noxious weeds. The classification system may include the current geographic distribution, relative threat, and actions initiated to prevent introduction or distribution.

(2) Management plans

In conjunction with the classification system, the Secretary may develop integrated management plans for noxious weeds for the geographic region or ecological range where the noxious weed is found in the United States.

Appendix D

(d) Application of least drastic action

No plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance shall be destroyed, exported, or returned to the shipping point of origin, or ordered to be destroyed, exported, or returned to the shipping point of origin under this section unless, in the opinion of the Secretary, there is no less drastic action that is feasible and that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed within and throughout the United States.

7 U.S.C.A. § 7715

§ 7715. Declaration of extraordinary emergency and resulting authorities

(a) Authority to declare

If the Secretary determines that an extraordinary emergency exists because of the presence of a plant pest or noxious weed that is new to or not known to be widely prevalent in or distributed within and throughout the United States and that the presence of the plant pest or noxious weed threatens plants or plant products of the United States, the Secretary may—

Appendix D

(1) hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, any plant, biological control organism, plant product, article, or means of conveyance that the Secretary has reason to believe is infested with the plant pest or noxious weed;

(2) quarantine, treat, or apply other remedial measures to any premises, including any plants, biological control organisms, plant products, articles, or means of conveyance on the premises, that the Secretary has reason to believe is infested with the plant pest or noxious weed;

(3) quarantine any State or portion of a State in which the Secretary finds the plant pest or noxious weed or any plant, biological control organism, plant product, article, or means of conveyance that the Secretary has reason to believe is infested with the plant pest or noxious weed; and

(4) prohibit or restrict the movement within a State of any plant, biological control organism, plant product, article, or means of conveyance when the Secretary determines that the prohibition or restriction is necessary to prevent the dissemination of the plant pest or noxious weed or to eradicate the plant pest or noxious weed.

Appendix D

(b) Required finding of emergency

The Secretary may take action under this section only upon finding, after review and consultation with the Governor or other appropriate official of the State affected, that the measures being taken by the State are inadequate to eradicate the plant pest or noxious weed.

(c) Notification procedures

(1) In general

Except as provided in paragraph (2), before any action is taken in any State under this section, the Secretary shall notify the Governor or other appropriate official of the State affected, issue a public announcement, and file for publication in the Federal Register a statement of—

(A) the Secretary's findings;

(B) the action the Secretary intends to take;

(C) the reasons for the intended action; and

(D) where practicable, an estimate of the anticipated duration of the extraordinary emergency.

Appendix D

(2) Time sensitive actions

If it is not possible to file for publication in the Federal Register prior to taking action, the filing shall be made within a reasonable time, not to exceed 10 business days, after commencement of the action.

(d) Application of least drastic action

No plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance shall be destroyed, exported, or returned to the shipping point of origin, or ordered to be destroyed, exported, or returned to the shipping point of origin under this section unless, in the opinion of the Secretary, there is no less drastic action that is feasible and that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed within and throughout the United States.

(e) Payment of compensation

The Secretary may pay compensation to any person for economic losses incurred by the person as a result of action taken by the Secretary under this section. The determination by the Secretary of the amount of any compensation to be paid under this subsection shall be final and shall not be subject to judicial review or a review of longer than 60 days by any officer or employee of the Federal Government other than the Secretary or the designee of the Secretary.

Appendix D

7 U.S.C.A. § 7716

§ 7716. Recovery of compensation for unauthorized activities

(a) Recovery action

The owner of any plant, plant biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance destroyed or otherwise disposed of by the Secretary under section 7714 or 7715 of this title may bring an action against the United States to recover just compensation for the destruction or disposal of the plant, plant biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance (not including compensation for loss due to delays incident to determining eligibility for importation, entry, exportation, movement in interstate commerce, or release into the environment), but only if the owner establishes that the destruction or disposal was not authorized under this chapter.

(b) Time for action; location

An action under this section shall be brought not later than 1 year after the destruction or disposal of the plant, plant biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance involved. The action may be brought in any United States district court where the owner is found, resides, transacts business, is licensed to do business, or is incorporated.

Appendix D

7 U.S.C.A. § 7717

§ 7717. Control of grasshoppers and Mormon crickets

(a) In general

Subject to the availability of funds pursuant to this section, the Secretary shall carry out a program to control grasshoppers and Mormon crickets on all Federal lands to protect rangeland.

(b) Transfer authority

(1) In general

Subject to paragraph (3), upon the request of the Secretary of Agriculture, the Secretary of the Interior shall transfer to the Secretary of Agriculture, from any no-year appropriations, funds for the prevention, suppression, and control of actual or potential grasshopper and Mormon cricket outbreaks on Federal lands under the jurisdiction of the Secretary of the Interior. The transferred funds shall be available only for the payment of obligations incurred on such Federal lands.

(2) Transfer requests

Requests for the transfer of funds pursuant to this subsection shall be made as promptly as possible by the Secretary.

Appendix D

(3) Limitation

Funds transferred pursuant to this subsection may not be used by the Secretary until funds specifically appropriated to the Secretary for grasshopper control have been exhausted.

(4) Replenishment of transferred funds

Funds transferred pursuant to this subsection shall be replenished by supplemental or regular appropriations, which shall be requested as promptly as possible.

(c) Treatment for grasshoppers and Mormon crickets

(1) In general

Subject to the availability of funds pursuant to this section, on request of the administering agency or the agriculture department of an affected State, the Secretary, to protect rangeland, shall immediately treat Federal, State, or private lands that are infested with grasshoppers or Mormon crickets at levels of economic infestation, unless the Secretary determines that delaying treatment will not cause greater economic damage to adjacent owners of rangeland.

Appendix D

(2) Other programs

In carrying out this section, the Secretary shall work in conjunction with other Federal, State, and private prevention, control, or suppression efforts to protect rangeland.

(d) Federal cost share of treatment

(1) Control on Federal lands

Out of funds made available or transferred under this section, the Secretary shall pay 100 percent of the cost of grasshopper or Mormon cricket control on Federal lands to protect rangeland.

(2) Control on State lands

Out of funds made available under this section, the Secretary shall pay 50 percent of the cost of grasshopper or Mormon cricket control on State lands.

(3) Control on private lands

Out of funds made available under this section, the Secretary shall pay 33.3 percent of the cost of grasshopper or Mormon cricket control on private lands.

(e) Training

From appropriated funds made available or transferred by the Secretary of the Interior to the Secretary of Agriculture for such purposes, the Secretary of Agriculture shall provide adequate funding for a program to train personnel to accomplish effectively the objective of this section.

7 U.S.C.A. § 7718

§ 7718. Certification for exports

The Secretary may certify as to the freedom of plants, plant products, or biological control organisms from plant pests or noxious weeds, or the exposure of plants, plant products, or biological control organisms to plant pests or noxious weeds, according to the phytosanitary or other requirements of the countries to which the plants, plant products, or biological control organisms may be exported.

Appendix D

7 U.S.C.A. § 7719

§ 7719. Methyl bromide

(a) In general

The Secretary, upon request of State, local, or tribal authorities, shall determine whether methyl bromide treatments or applications required by State, local, or tribal authorities to prevent the introduction, establishment, or spread of plant pests (including diseases) or noxious weeds should be authorized as an official control or official requirement. The Secretary shall not authorize such treatments or applications unless the Secretary finds there is no other registered, effective, and economically feasible alternative available.

(b) Methyl bromide alternative

The Secretary, in consultation with State, local and tribal authorities, shall establish a program to identify alternatives to methyl bromide for treatment and control of plant pests and weeds. For uses where no registered, effective, economically feasible alternatives available can currently be identified, the Secretary shall initiate research programs to develop alternative methods of control and treatment.

(c) Registry

Not later than 180 days after May 13, 2002, the Secretary shall publish, and thereafter maintain, a registry of State, local, and tribal requirements authorized by the Secretary under this section.

(d) Administration

(1) Timeline for determination

Upon the promulgation of regulations to carry out this section, the Secretary shall make the determination required by subsection (a) of this section not later than 90 days after receiving the request for such a determination.

(2) Construction

Nothing in this section shall be construed to alter or modify the authority of the Administrator of the Environmental Protection Agency or to provide any authority to the Secretary of Agriculture under the Clean Air Act or regulations promulgated under the Clean Air Act.

Appendix D

7 U.S.C.A. § 7731

§ 7731. Inspections, seizures, and warrants

(a) Role of Attorney General

The activities authorized by this section shall be carried out consistent with guidelines approved by the Attorney General.

(b) Warrantless inspections

The Secretary may stop and inspect, without a warrant, any person or means of conveyance moving—

(1) into the United States to determine whether the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article subject to this chapter;

(2) in interstate commerce, upon probable cause to believe that the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article subject to this chapter; and

(3) in intrastate commerce from or within any State, portion of a State, or premises quarantined as part of a extraordinary emergency declared under section 7715 of this

title upon probable cause to believe that the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article regulated under that section or is moving subject to that section.

(c) Inspections with a warrant

(1) General authority

The Secretary may enter, with a warrant, any premises in the United States for the purpose of conducting investigations or making inspections and seizures under this chapter.

(2) Application and issuance of a warrant

Upon proper oath or affirmation showing probable cause to believe that there is on certain premises any plant, plant product, biological control organism, plant pest, noxious weed, article, facility, or means of conveyance regulated under this chapter, a United States judge, a judge of a court of record in the United States, or a United States magistrate judge may, within the judge's or magistrate's[1] jurisdiction, issue a warrant for the entry upon the premises to conduct any investigation or make any inspection or seizure under this chapter. The warrant may be applied for and executed by the Secretary or any United States Marshal.

1. So in original. Probably should be "magistrate judge's".

Appendix D

7 U.S.C.A. § 7732

§ 7732. Collection of information

The Secretary may gather and compile information and conduct any investigations the Secretary considers necessary for the administration and enforcement of this chapter.

7 U.S.C.A. § 7733

§ 7733. Subpoena authority

(a) Authority to issue

The Secretary shall have power to subpoena the attendance and testimony of any witness, and the production of all documentary evidence relating to the administration or enforcement of this chapter or any matter under investigation in connection with this chapter.

(b) Location of production

The attendance of any witness and production of documentary evidence relevant to the inquiry may be required from any place in the United States.

(c) Enforcement of subpoena

In the case of disobedience to a subpoena by any person, the Secretary may request the Attorney

General to invoke the aid of any court of the United States within the jurisdiction in which the investigation is conducted, or where the person resides, is found, transacts business, is licensed to do business, or is incorporated, in requiring the attendance and testimony of any witness and the production of documentary evidence. In case of a refusal to obey a subpoena issued to any person, a court may order the person to appear before the Secretary and give evidence concerning the matter in question or to produce documentary evidence. Any failure to obey the court's order may be punished by the court as a contempt of the court.

(d) Compensation

Witnesses summoned by the Secretary shall be paid the same fees and mileage that are paid to witnesses in courts of the United States, and witnesses whose depositions are taken and the persons taking the depositions shall be entitled to the same fees that are paid for similar services in the courts of the United States.

(e) Procedures

The Secretary shall publish procedures for the issuance of subpoenas under this section. Such procedures shall include a requirement that subpoenas be reviewed for legal sufficiency and signed by the Secretary. If the authority to sign a subpoena is delegated to an agency other than the

Office of Administrative Law Judges, the agency receiving the delegation shall seek review for legal sufficiency outside that agency.

(f) Repealed. Pub.L. 107-171, Title X, § 10418(b)(2)(C), May 13, 2002, 116 Stat. 508

7 U.S.C.A. § 7734

§ 7734. Penalties for violation

(a) Criminal penalties

(1) Offenses

(A) In general

A person that knowingly violates this chapter, or knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this title shall be fined under Title 18, imprisoned not more than 1 year, or both.

(B) Movement

A person that knowingly imports, enters, exports, or moves any plant, plant product, biological control organism, plant pest, noxious weed, or article, for distribution or

sale, in violation of this chapter, shall be fined under Title 18, imprisoned not more than 5 years, or both.

(2) Multiple violations

On the second and any subsequent conviction of a person of a violation of this chapter under paragraph (1), the person shall be fined under Title 18, imprisoned not more than 10 years, or both.

(b) Civil penalties

(1) In general

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) $50,000 in the case of any individual (except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), $250,000 in the case of any other person for each violation, and $500,000 for

all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this title that results in the person deriving pecuniary gain or causing pecuniary loss to another.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator—

(A) ability to pay;

(B) effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) any other factors the Secretary considers appropriate.

(3) Settlement of civil penalties

The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty that may be assessed under this subsection.

(4) Finality of orders

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of Title 28. The validity of the Secretary's order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

(c) Liability for acts of an agent

When construing and enforcing this chapter, the act, omission, or failure of any officer, agent, or person acting for or employed by any other person within the scope of his or her employment or office, shall be deemed also to be the act, omission, or failure of the other person.

(d) Guidelines for civil penalties

The Secretary shall coordinate with the Attorney General to establish guidelines to determine under

what circumstances the Secretary may issue a civil penalty or suitable notice of warning in lieu of prosecution by the Attorney General of a violation of this chapter.

7 U.S.C.A. § 7735

§ 7735. Enforcement actions of Attorney General

The Attorney General may—

(1) prosecute, in the name of the United States, all criminal violations of this chapter that are referred to the Attorney General by the Secretary or are brought to the notice of the Attorney General by any person;

(2) bring an action to enjoin the violation of or to compel compliance with this chapter, or to enjoin any interference by any person with the Secretary in carrying out this chapter, whenever the Secretary has reason to believe that the person has violated, or is about to violate this chapter, or has interfered, or is about to interfere, with the Secretary; and

(3) bring an action for the recovery of any unpaid civil penalty, funds under reimbursable agreements, late payment penalty, or interest assessed under this chapter.

Appendix D

7 U.S.C.A. § 7736

§ 7736. Court jurisdiction

(a) In general

The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of other territories and possessions are vested with jurisdiction in all cases arising under this chapter. Any action arising under this chapter may be brought, and process may be served, in the judicial district where a violation or interference occurred or is about to occur, or where the person charged with the violation, interference, impending violation, impending interference, or failure to pay resides, is found, transacts business, is licensed to do business, or is incorporated.

(b) Exception

This section does not apply to the imposition of civil penalties under section 7734(b) of this title.

Appendix D

7 U.S.C.A. § 7751

§ 7751. Cooperation

(a) In general

The Secretary may cooperate with other Federal agencies or entities, States or political subdivisions of States, national governments, local governments of other nations, domestic or international organizations, domestic or international associations, and other persons to carry out this chapter.

(b) Responsibility

The individual or entity cooperating with the Secretary under subsection (a) of this section shall be responsible for—

(1) the authority necessary to conduct the operations or take measures on all land and properties within the foreign country or State, other than those owned or controlled by the United States; and

(2) other facilities and means as the Secretary determines necessary.

(c) Transfer of biological control methods

The Secretary may transfer to a State, Federal agency, or other person biological control methods using biological control organisms against plant pests or noxious weeds.

(d) Cooperation in program administration

The Secretary may cooperate with State authorities or other persons in the administration of programs for the improvement of plants, plant products, and biological control organisms.

(e) Phytosanitary issues

The Secretary shall ensure that phytosanitary issues involving imports and exports are addressed based on sound science and consistent with applicable international agreements. To accomplish these goals, the Secretary may—

(1) conduct direct negotiations with plant health officials or other appropriate officials of other countries;

(2) provide technical assistance, training, and guidance to any country requesting such assistance in the development of agricultural health protection systems and import/export systems; and

(3) maintain plant health and quarantine expertise in other countries—

(A) to facilitate the establishment of phytosanitary systems and the resolution of phytosanitary issues;

(B) to assist those countries with agricultural health protection activities; and

(C) to provide general liaison on agricultural health issues with the plant health or other appropriate officials of the country.

7 U.S.C.A. § 7752

§ 7752. Buildings, land, people, claims, and agreements

(a) In general

To the extent necessary to carry out this chapter, the Secretary may acquire and maintain all real or personal property for special purposes and employ any persons, make grants, and enter into any contracts, cooperative agreements, memoranda of understanding, or other agreements.

(b) Tort claims

(1) In general

Except as provided in paragraph (2), the Secretary may pay tort claims in the manner authorized in the first paragraph of section 2672 of Title 28, when the claims arise outside the United States in connection with activities that are authorized under this chapter.

(2) Requirements of claim

A claim may not be allowed under this subsection unless the claim is presented in writing to the Secretary within 2 years after the date on which the claim accrues.

7 U.S.C.A. § 7753

§ 7753. Reimbursable agreements

(a) Authority to enter into agreements

The Secretary may enter into reimbursable fee agreements with persons for preclearance of plants, plant products, biological control organisms, and articles at locations outside the United States for movement into the United States.

Appendix D

(b) Funds collected for preclearance

Funds collected for preclearance shall be credited to accounts which may be established by the Secretary for this purpose and shall remain available until expended for the preclearance activities without fiscal year limitation.

(c) Payment of employees

(1) In general

Notwithstanding any other law, the Secretary may pay employees of the Department of Agriculture performing services relating to imports into and exports from the United States, for all overtime, night, or holiday work performed by them, at rates of pay established by the Secretary .

(2) Reimbursement of the Secretary

(A) In general

The Secretary may require persons for whom the services are performed to reimburse the Secretary for any sums of money paid by the Secretary for the services.

Appendix D

(B) Use of funds

All funds collected under this paragraph shall be credited to the account that incurs the costs and shall remain available until expended without fiscal year limitation.

(d) Late payment penalties

(1) Collection

Upon failure to reimburse the Secretary in accordance with this section, the Secretary may assess a late payment penalty, and the overdue funds shall accrue interest, as required by section 3717 of Title 31.

(2) Use of funds

Any late payment penalty and any accrued interest shall be credited to the account that incurs the costs and shall remain available until expended without fiscal year limitation.

Appendix D

7 U.S.C.A. § 7754

§ 7754. Regulations and orders

The Secretary may issue such regulations and orders as the Secretary considers necessary to carry out this chapter.

§ 7755. Protection for mail handlers

This chapter shall not apply to any employee of the United States in the performance of the duties of the employee in handling the mail.

7 U.S.C.A. § 7756

§ 7756. Preemption

(a) Regulation of foreign commerce

No State or political subdivision of a State may regulate in foreign commerce any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order—

(1) to control a plant pest or noxious weed;

(2) to eradicate a plant pest or noxious weed; or

(3) prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed.

(b) Regulation of interstate commerce

(1) In general

Except as provided in paragraph (2), no State or political subdivision of a State may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.

(2) Exceptions

(A) Regulations consistent with Federal regulations

A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants,

biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and do not exceed the regulations or orders issued by the Secretary.

(B) Special need

A State or political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests, or noxious weeds that are in addition to the prohibitions or restrictions imposed by the Secretary, if the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

7 U.S.C.A. § 7757

§ 7757. Severability

If any provision of this chapter or application of any provision of this chapter to any person or circumstances is held invalid, the remainder of this chapter and the application of the provision to other persons and circumstances shall not be affected by the invalidity.

Appendix D

7 U.S.C.A. § 7758

§ 7758. Repeal of superseded laws

(a), (b) Omitted

(c) Effect on regulations

Regulations issued under the authority of a provision of law repealed by subsection (a) of this section shall remain in effect until such time as the Secretary issues a regulation under *section 7754* of this title that supersedes the earlier regulation.

7 U.S.C.A. § 7759

§ 7759. Fees for inspection of plants for exporting or transiting

(a) to (e) Repealed. Pub.L. 106-224, Title IV, § 438(a)(3), June 20, 2000, 114 Stat. 454

(f) Authorization of appropriations; fees, late payment penalties, and accrued interest

(1) Notwithstanding paragraph (2), there are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section. Unless otherwise specifically authorized or provided for in appropriations Acts, no part of such sums shall be used to pay the cost or value of property injured or destroyed.

(2) The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of providing for the inspection of plants and plant products offered for export or transiting the United States and certifying to shippers and interested parties as to the freedom of such plants and plant products from plant pests according to the phytosanitary requirements of the foreign countries to which such plants and plant products may be exported, or to the freedom from exposure to plant pests while in transit through the United States. Any person for whom such an activity is performed shall be liable for payment of fees assessed. Upon failure to pay such fees when due, the Secretary of Agriculture shall assess a late payment penalty, and such overdue fees shall accrue interest, as required by section 3717 of Title 31. All fees, late payment penalties, and accrued interest collected shall be credited to such accounts that incur the costs and shall remain available until expended without fiscal year limitation. The Secretary of Agriculture shall have a lien for the fees, any late payment penalty, and any accrued interest assessed against the plant or plant product for which services have been provided. In the case of any person who fails to make payment when due, the Secretary of Agriculture shall also have a lien against any plant or plant product thereafter attempted to be exported by such person. The Secretary of Agriculture may, in case of

nonpayment of the fees, late payment penalty, or accrued interest, after giving reasonable notice of default to the person liable for payment of such assessments, sell at public sale after reasonable public notice, or otherwise dispose of, any such plant or plant product upon which the Secretary of Agriculture has a lien pursuant to this section. If the sale proceeds exceed the fees due, any late payment penalty assessed, any accrued interest and the expenses of the sale, the excess shall be paid, in accordance with regulations of the Secretary of Agriculture, to the owner of the plant or plant product sold upon the owner making application therefore with proof of ownership, within six months after such sale, and otherwise the excess shall be credited to accounts that incur the costs and shall remain available until expended. The Secretary of Agriculture shall, pursuant to regulations as prescribed by the Secretary of Agriculture, suspend performance of services to persons who have failed to pay such fees, late payment penalty and accrued interest.

Appendix D

7 U.S.C.A. § 7760

§ 7760. State terminal inspection; transmission of mailed packages for State inspection; nonmailable matter; punishment for violations; rules and regulations by United States Postal Service

When any State shall provide for terminal inspection of plants and plant products, and shall establish and maintain, at the sole expense of the State, such inspection at one or more places therein, the proper officials of said State may submit to the Secretary of Agriculture a list of plants and plant products and the plant pests transmitted thereby, that in the opinion of said officials should be subject to terminal inspection in order to prevent the introduction or dissemination in said State of pests injurious to agriculture. Upon his approval of said list, in whole or in part, the Secretary of Agriculture shall transmit the same to the United States Postal Service, and thereafter all packages containing any plants or plant products named in said approved lists shall, upon payment of postage therefor, be forwarded by the postmaster at the destination of said package to the proper State official at the nearest place where inspection is maintained. If the plants or plant products (including seed) are found upon inspection to be free from injurious pests and not in violation of a plant-quarantine law or plant-quarantine regulation of the United States Department of Agriculture or of the State

of destination pertaining to such injurious pests, or if infected shall be disinfected by said official, they shall upon payment of postage therefor be returned to the postmaster at the place of inspection to be forward[1] to the person to whom they are addressed; but if found to be infected with injurious pests and incapable of satisfactory disinfection or in violation of a plant-quarantine law or plant-quarantine regulation of the United States Department of Agriculture or of the State of destination pertaining to such injurious pests, the State inspector shall so notify the postmaster at the place of inspection who shall promptly notify the sender of said plants or plant products that they will be returned to him upon his request and at his expense, or in default of such request that they will be turned over to the State authorities for destruction.

It shall be unlawful for any person, firm, or corporation to deposit in the United States mails any package containing any plant or plant product addressed to any place within a State maintaining inspection thereof, as herein defined, without plainly marking the package so that its contents may be readily ascertained by an inspection of the outside thereof. Whoever shall fail to so mark said packages shall be punished by a fine of not more than $100.

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1. So in original. Probably should be "forwarded".

Appendix D

The United States Postal Service is authorized and directed to make all needful rules and regulations for carrying out the purposes hereof.

7 U.S.C.A. § 7771

§ 7771. Authorization of appropriations

There are authorized to be appropriated such amounts as may be necessary to carry out this chapter. Except as specifically authorized by law, no part of the money appropriated under this section shall be used to pay indemnities for property injured or destroyed by or at the direction of the Secretary.

7 U.S.C.A. § 7772

§ 7772. Transfer authority

(a) Authority to transfer certain funds

In connection with an emergency in which a plant pest or noxious weed threatens any segment of the agricultural production of the United States, the Secretary may transfer from other appropriations or funds available to the agencies or corporations of the Department of Agriculture such amounts as the Secretary considers necessary to be available in the emergency for the arrest, control, eradication, and prevention of the spread of the plant pest or noxious weed and for related expenses.

(b) Availability

Any funds transferred under this section shall remain available for such purposes without fiscal year limitation.

(c) Secretarial discretion

The action of any officer, employee, or agent of the Secretary in carrying out this Act, including determining the amount of and making any payment authorized to be made under this chapter, shall not be subject to a review of longer than 60 days by any officer or employee of the Federal Government other than the Secretary or the designee of the Secretary.